Nenggani Asmo v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–4 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND LINTON ALBERT JJCA
22 MAY 2013

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused Indonesian national on her way to board flight — Metal detector at airport triggered — Accused found to carry contraband — 665.1g of dangerous drugs found strapped at left and right sides of panty girdle — Whether defence probable or bare denial — Whether defence concocted — Whether prima facie case established — Whether reasonable doubt raised — Whether there was misdirection by trial judge — Whether evidence considered sufficiently

The appellant, an Indonesian national, was about to board a flight back to Indonesia at the Kuala Lumpur International Airport ('KLIA') when the alarm on the metal detector triggered while she was passing through. During examination, the appellant, who was wearing a blouse and a fairly long skirt, was asked to remove her skirt. Underneath her skirt, was a panty girdle, which was bulging on both the left and right sides and was found to conceal two plastic packets containing white powder which were later confirmed to be 665.1g of dangerous drugs comprising 616.5g heroin and 48.6g monoacetylmorphines. Satisfied that the prosecution had made out a prima facie case, the appellant was called to enter defence. In her defence, the appellant submitted that she had come to Malaysia to sell Indonesian batik and had previously spent seven nights in Bangkok. While in Bangkok, a friend of the appellant ('Deta') had contacted her and requested the appellant to meet a man who would be giving the appellant a girdle. Deta explained to the appellant that money was concealed inside the girdle so it could be easily transported and to avoid paying custom duties. Deta had also threatened the appellant with dire consequences if the appellant refused to wear the girdle. Later, the appellant met the man at the lobby of a hotel and was given a plastic bag containing the girdle which she obligingly put on. According to the appellant, she was under the impression that the girdle contained money and was unaware it contained drugs instead. At the conclusion of the trial, the trial judge found that the appellant had failed to raise a reasonable doubt and the appellant was convicted of the offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. Hence, the present appeal. The appellant argued that the trial judge misdirected herself when she failed to appreciate that the element of knowledge had been rebutted by the defence and when she held that the defence was a bare denial even though the

evidence by the appellant was consistent with her cautioned statement; and that the learned judge had failed to consider the cautioned statement sufficiently.

Held, dismissing the appeal:

(1) Although the benefit of every reasonable doubt must be given to the appellant and could not be withheld from her, the court must not entertain it on grounds which were fanciful or in the nature of speculation; it was based upon reason and common sense, and could not be illogical or irrational. The existence of reasonable doubt was dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation. Based on the facts of the case, the appellant's story was incapable of raising a reasonable doubt on the prosecution's case (see para 15).

(2) While the contents of the girdle might not have been apparent, the bulge on both the right and left sides of the girdle was certainly noticeable. Indeed, weighing approximately more than 300g a piece, it would be hard to believe the appellant's story that she believed them to contain money. The drugs were concealed in an undergarment that was worn next to the skin. The nature of the garment being a girdle meant that it was intended not just to be worn next to the skin but to adhere closely to the skin. The intimate nature of the girdle meant that in order to wear the girdle, the appellant would have to physically handle it herself at close range. That being the case, the appellant would certainly be able to feel whatever was concealed in the girdle. It would be implausible and far-fetched for the appellant not to be able to distinguish the feeling between more than 600g of powdery substance and currency/money, which was obviously made out of paper (see para 15).

(3) The cautioned statement made by the appellant to the police was not in itself evidence of the truth of the facts stated. The cautioned statement must not be accepted at face value but had to be tested and evaluated by taking into account the entire evidence placed before the court. As a matter of general principle, it was a serious misdirection by way of non-direction, which would occasion a failure of justice and warrant appellate interference, if indeed the learned judge had failed to judicially consider at all the appellant's cautioned statement. A careful reading of the judgment revealed that the learned judge narrated the appellant's cautioned statement and further took exceptional care to consider and judicially appreciate the gist of the appellant's evidence in court and tested it with the cautioned statement (see para 22).

[Bahasa Malaysia summary

Perayu, seorang warganegara Indonesia, hendak menaiki penerbangan pulang ke Indonesia di Kuala Lumpur International Airport ('KLIA') apabila penggera

pada pengesan logam berbunyi semasa dia melepasinya. Ketika pemeriksaan, perayu, yang memakai blaus dan skirt yang agak panjang diminta untuk menanggalkan skirtnya. Di bawah skirtnya, adalah bengkung, yang terbonjol pada kedua-dua bahagian kanan dan kiri dan didapati menyembunyikan dua bungkusan plastik mengandungi serbuk putih yang kemudiannya disahkan sebagai 665.1g dadah berbahaya iaitu 616.5g heroin dan 48.6g monoacetylmorphines. Berpuas hati bahawa pihak pendakwaan telah membuktikan satu kes prima facie, perayu dipanggil untuk memasukkan pembelaan. Dalam pembelaannya perayu menghujahkan bahawa dia telah datang ke Malaysia untuk menjual batik Indonesia dan sebelum itu, menginap di Bangkok selama tujuh malam. Semasa di Bangkok, seorang rakan perayu ('Deta') telah menghubunginya dan meminta perayu untuk bertemu dengan seorang lelaki yang akan memberikan bengkung kepada perayu. Deta menjelaskan kepada perayu bahawa wang disembunyikan dalam bengkung agar ia boleh dibawa dengan mudah dan untuk mengelak daripada membayar duti kastam. Deta juga mengugut perayu dengan akibat buruk sekiranya perayu enggan memakai bengkung tersebut. Kemudian, perayu bertemu dengan lelaki tersebut di lobi sebuah hotel dan diberikan beg plastik yang mengandungi bengkung yang mana dia dengan patuh memakainya. Menurut perayu, dia beranggapan bahawa bengkung tersebut mengandungi wang dan tidak menyedari bahawa ia sebaliknya mengandungi dadah. Di akhir perbicaraan, hakim bicara mendapati bahawa perayu gagal membangkitkan keraguan munasabah dan perayu disabitkan atas kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa hakim bicara tersalah arah diri beliau apabila beliau gagal untuk mempertimbangkan bahawa elemen pengetahuan telah disangkal oleh pihak pembelaan dan apabila beliau memutuskan bahawa pembelaan adalah penafian semata-mata walaupun keterangan oleh perayu konsisten dengan pernyataan beramaran; dan bahawa hakim juga gagal untuk mempertimbangkan pernyataan beramaran tersebut dengan secukupnya.

Diputuskan, menolak rayuan:

(1) Walaupun manfaat setiap keraguan munasabah mesti diberikan kepada perayu dan tidak boleh ditahan daripadanya, mahkamah tidak harus melayaninya atas alasan yang merupakan khayalan atau bersifat spekulasi; ia berdasarkan kemunasabahan dan akal, dan tidak logik atau rasional. Kewujudan keraguan munasabah bergantung pada keseluruhan keterangan dan satu pemeriksaan atas kesemua keterangan dengan cara yang adil dan munasabah dan bukan secara berasingan. Berdasarkan fakta kes, cerita perayu tidak membangkitkan keraguan munasabah ke atas kes pendakwaan (lihat perenggan 15).

(2) Walaupun kandungan bengkung mungkin tidak kelihatan, bonjolan pada kedua-dua belah kanan dan kiri bengkung adalah nyata jelas.

Sesungguhnya, dengan berat lebih kurang 300g setiap satu, adalah sukar untuk mempercayai cerita perayu bahawa dia mempercayainya mengandungi wang. Dadah tersebut disembunyikan dalam pakaian dalam yang dipakai dekat dengan kulit. Sifat pakaian tersebut sebagai bengkung bermakna ia bukan sahaja sepatutnya dipakai dekat dengan kulit tetapi juga melekap pada kulit. Sifat intim bengkung bermakna bahawa untuk memakai bengkung tersebut, perayu perlu, dengan sendiri, memegangnya secara fizikal pada jarak yang dekat. Oleh itu, perayu seharusnya boleh merasa apa jua yang sembunyikan dalam bengkung tersebut. Adalah tidak masuk akal dan sesuatu yang dibuat-buat oleh perayu untuk tidak boleh membezakan antara 600g serbuk dan wang, yang dengan jelas diperbuat daripada kertas (lihat perenggan 15).

(3) Pernyataan beramaran yang dibuat oleh perayu kepada pihak polis bukan dengan sendirinya keterangan kebenaran fakta yang dinyatakan. Pernyataan beramaran tidak boleh diterima pada dasarnya dan harus diuji dan dipertimbangkan dengan mengambil kira kesemua keterangan yang dikemukakan di hadapan mahkamah. Sebagai perkara prinsip am, ia adalah salah arah serius akibat tidak ada arahdiri, yang akan menyebabkan kegagalan keadilan dan mewajarkan campur tangan rayuan, sekiranya hakim tersebut gagal untuk secara kehakiman mempertimbangkan pernyataan beramaran perayu. Satu penelitian ke atas penghakiman mendedahkan bahawa hakim telah menyebut pernyataan beramaran tersebut dan selanjutnya mengambil penjagaan lebih untuk mempertimbangkan secara kehakiman inti pati keterangan perayu di hadapan mahkamah dan mengujinya dengan pernyataan beramaran tersebut (lihat perenggan 22).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Nur Azmi bin So'aib v PP [2012] 2 AMR 112 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Alfian [2012] 2 MLJ 357, CA (refd)
PP v Hla Win [1995] 2 SLR 424, CA (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a)

Appeal from: Criminal Trial No 45–115 of 2009 (High Court, Shah Alam)

A

S Selvi (Gooi & Azura) for the appellant.
Samihah bt Razali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

B **Azahar Mohamed JCA (delivering judgment of the court):**

[1] Nenggani Asmo (the appellant), an Indonesian national was charged in the High Court at Shah Alam for trafficking in dangerous drugs weighing 665.1g comprising 616.5g of heroin and 48.6g of monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The dangerous drugs were found concealed in a girdle the appellant was wearing at the time of her arrest. She was convicted and sentenced to the mandatory death penalty prescribed by the Act.

[2] The appellant appealed to this court. We heard her appeal and we unanimously dismissed it. We now give our reasons.

[3] On 17 March 2009, the appellant was at the Check Point Link Bridge, Kuala Lumpur International Airport ('KLIA'). At about 7am, she was about to board a flight bound for Jogjakarta, Indonesia. On passing through the metal detector, the alarm on the metal detector was triggered. Farah Di-Za bt Mohd Jenun ('PW2'), a security officer with the Malaysia Airports Bhd who was also an auxiliary police officer, then conducted a search on the appellant. The appellant was wearing a blouse and a fairly long skirt. The search by PW2 aroused suspicions. In this regard, the material part of the evidence of PW2 is as follows:

Q: Pada jam lebih kurang pukul 7.00 pagi, 17.3.2009 apa berlaku?

A: Lebih kurang jam 7.00 pagi lalu seorang penumpang wanita, dia memasuki handbag di dalam x-ray mesin kemudian beliau melalui AMD Actual Metal Detector.

Q: Ketika beliau melalui AMD apa berlaku?

A: Apabila dia melalui AMD, AMD tersebut berbunyi.

Q: Seterusnya apa tindakan kamu?

A: Saya buat pemeriksaan badan dari atas hingga bahagian bawah, apabila melalui di bahagian peha saya merasai terdapat 2 ketulan di peha kiri dan kanan.

Q: Lepas itu apa yang telah kamu lakukan bila merasai sesuatu barang tersebut?

A: Apabila saya merasai barang tersebut saya perlu mengetahui apa barang

tersebut yang berada di dalam badan, untuk itu saya maklumkan kepada Security Operation Center untuk membuat pemeriksaan hundred percent.

[4] The appellant was then brought to the examination room where a thorough body search was conducted by PW2 and her colleague, Constable Sri Norshaedah bt Zakaria ('PW3') on the person of the appellant. PW2 asked the appellant to remove her skirt. The appellant did so. At that point, PW2 saw the appellant was wearing underneath her skirt, a panty girdle, which appeared to PW2 to contain something as there were bulges on both the left and right sides of the girdle. PW2 then used a Swiss knife to slash both the left and right sides of the girdle and found two plastic packets containing white powder, suspected to be dangerous drugs. The appellant was arrested. The two packets were then sent to the Chemistry Department for chemical examination and analysis. The two packets were later confirmed by the chemist, Suhana bt Ismail ('PW4') to contain 665.1g of dangerous drugs comprising 616.5g heroin and 48.6g monoacetylmorphines. That, in a summary, is the prosecution's case.

[5] On the basis of the evidence that we have discussed earlier, after the conclusion of the case for the prosecution, the learned judge came to the finding that the prosecution had made out a prima facie case against the appellant and therefore called upon the appellant to enter on her defence in respect of the offence charged. The learned judge made a finding that the appellant was in possession of the dangerous drugs in question and as the weight of the dangerous drugs was above 15g, she invoked the presumption under s 37(da) of the Act to presume that the appellant was trafficking in the dangerous drugs.

[6] The appellant elected to give evidence on oath. The essence of her defence is as follows. The appellant had come to Malaysia on 7 March 2009 for the purpose of selling Indonesian batik to stores in Chow Kit Road. The next day on 8 March 2009 the appellant went to Butterworth by bus. At Butterworth, the appellant purchased a rail ticket to Bangkok. The purpose of the trip to Bangkok was to purchase clothing, shoes and handbags to be brought to and sold in Jogjakarta where the appellant owns a shop. The items purchased were then packed in a luggage bag and checked in as accompanying baggage. The accused had spent seven nights in Bangkok.

[7] While in Bangkok, a friend of the appellant referred to as Deta had contacted the appellant by telephone and requested the appellant to meet a black man who would be giving the appellant a girdle containing money that the appellant was instructed to wear. Deta had explained to the appellant that the money was concealed inside the girdle so it could be easily transported and to avoid paying custom duties. Deta had also threatened the appellant with dire

consequences if the appellant refused to wear the girdle. Later, the appellant met the black man at the lobby of a hotel and was given a plastic bag containing the girdle. The black man showed the girdle to the appellant and, through hand signals, instructed the appellant to wear it.

[8] Subsequently, the appellant boarded a bus from Bangkok to Padang Besar and from Padang Besar to Kuala Lumpur. During the entire 16 hour journey the appellant wore the girdle without taking it off. The appellant spent another night at a hotel in Kuala Lumpur taking the girdle off before going to sleep.

[9] The next day the appellant wore the girdle again and went to KLIA to board a flight to Jogjakarta. When the appellant went through the metal detector, the alarm was activated. The appellant was searched and found to be wearing the girdle containing the drugs. The accused claimed that she was not aware that the girdle contained drugs but thought it contained money (US dollars) belonging to Deta.

[10] In her cautioned statement, the appellant also contended that she was unaware the girdle contained drugs; that she had been forced to wear the girdle by a woman named Deta who had sent her a threatening SMS. The accused also claimed she had been given the girdle by a black man whom she met in Bangkok and she thought the girdle contained money.

[11] At the conclusion of the trial, the learned judge found that the appellant had failed to raise a reasonable doubt on the case of the prosecution and that the appellant had failed to rebut the presumption of trafficking on the balance of probabilities. As indicated earlier, the appellant was convicted of the offence and sentenced accordingly.

[12] Before us the appellant raised three principal grounds in support of her appeal. We shall now deal with each of them in turn.

[13] In the first place, learned counsel for the appellant argued that the learned trial judge misdirected herself when she failed to appreciate that the element of knowledge has been rebutted by the defence. It was submitted that a reasonable doubt had been raised that the appellant had knowledge of the contents of the girdle. The defence advanced was consistent with her cautioned statement and the defence stand during the prosecution's case. It was not an after thought defence and the said defence was not demolished during cross-examination. She had been forced to wear the girdle by a woman named Deta who sent her a threatening SMS and that she had been given the girdle by a black man whom she met in Bangkok. She thought the girdle contained money. Delta had explained to the appellant that the money was concealed inside the girdle so that it can be easily transported and to avoid paying custom

duties. According to learned counsel, the drugs were not apparent as they were wrapped in brown packaging and had been concealed by being sewn under a brown coloured girdle.

[14] In our view, in substance the appellant's defence was that she was an innocent carrier and that she was deceived by the black man and Deta to carry the dangerous drugs in question. The appellant acknowledged wearing the girdle containing the dangerous drugs but disputed having knowledge of the said dangerous drugs. The appellant pointed the blame to both the black man and Deta. Whether a defence of this nature will succeed or not would very much depend on the facts of each case. In considering this matter, we had scrutinised the judgment of the learned judge. In our view, the learned judge had expressly referred to the defence and had carefully considered it. This is what the learned judge said in her judgment:

> The accused had admitted wearing the girdle containing the drugs for 16 hrs — on the bus journey from Bangkok to Kuala Lumpur, taking it off before going to bed and putting it on again before going to KLIA to board her flight to Jogjakarta. There were at least 600g of heroin sewn inside the sides of the girdle. While the drugs were concealed such as not to be apparent to the naked eye, the accused had admitted wearing it next to her skin for at least 16 hours continuously. In such circumstances, it is inherently incredible that the accused is unable to distinguish between paper currency (US dollar) and powdery substance (heroin). The accused also had plenty of opportunity to examine the girdle or at the very least-in putting on and taking off the girdle, to handle the girdle at close range. Incidentally-or coincidentally-the girdle was a correct fit for the accused. From the above, the inescapable conclusion is that the accused had the requisite mens rea in respect of the drugs cunningly concealed in her girdle.

[15] We find ourselves in full agreement with the findings of the learned judge. In our judgment, the learned judge directed herself correctly upon this aspect of law and facts. Her findings of fact do not contain any error warranting appellate intervention. The learned judge took exceptional care to consider and judicially appreciate the appellant's defence at some length before coming to a definite finding of fact that the appellant had the requisite mens rea in respect of the drugs deceitfully concealed in her girdle. Although the benefit of every reasonable doubt must be given to the appellant and cannot be withheld from her, the court must not entertain it on grounds which are fanciful or in the nature of speculation; it is based upon reason and common sense, and cannot be illogical or irrational. The existence of reasonable doubt is dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation. Based on the facts of the case, in our judgment, the appellant's story is incapable of raising a reasonable doubt on the prosecution's case. The learned judge in her judgment also said that while the contents of the girdle may not be apparent, the bulge on both the right and

left sides of the girdle was certainly noticeable. Indeed, weighing approximately more than 300g a piece, it would be hard to believe the appellant's story that she believed them to contain money. As observed by the learned judge, the drugs were concealed in an undergarment that is worn next to the skin. The nature of the garment being a girdle means that it is intended not just to be worn next to the skin but to adhere closely to the skin. The intimate nature of the girdle means that in order to wear the girdle the appellant would have to physically handle it herself at close range. That being the case, the appellant would certainly be able to feel whatever was concealed in the girdle. It would be implausible and far-fetched for the appellant not to be able to distinguish the feeling between more than 600g of powdery substance (the drugs) and currency/money, which is obviously made out of paper.

[16] What's more, it is the appellant's story that she had been given the girdle in Bangkok by a black man on 15 March 2009, and then entered Malaysia where she spent one night at a hotel in Kuala Lumpur. The accused therefore had more than enough opportunity to look at what was concealed inside the girdle. But she deliberately did not take the trouble to inspect the girdle but merely relied on what were said by Deta and the black man. In our view, she shut her eyes to the obvious and consciously refrained from inquiry because she knew what was inside the girdle. No one had prevented her from checking it. Having regard to the facts and the prevailing circumstances of this case, in our view, the state of affairs are such that she is guilty of willful blindness to the obvious truth of the matter (see *Public Prosecutor v Hla Win* [1995] 2 SLR 424 and *Public Prosecutor v Alfian* [2012] 2 MLJ 357).

[17] Besides, if indeed the accused thought that the contents were money, a reasonable person's reaction would be shocked upon seeing that the content is something otherwise than what she had in her mind. However, PW2 said when she cut the girdle and found the white powdery substance contained inside the plastic package, the appellant just remain silent and calm. This fact gives rise to a very strong inference that she was aware of the dangerous drugs she was carrying.

[18] Moreover, the manner in which the appellant carried the drugs on her person points to the appellant having knowledge of the offending dangerous drugs at the material time. In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, a search of the person of the accused was conducted and a black plastic bag was found tucked away in the front of the jeans worn by him. Inside the black plastic bag was a transparent plastic bag containing 436.2g of cannabis or *ganja*. In delivering the judgment of the Federal Court, Augustine Paul FCJ said:

> In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession.

[19] Certainly, the manner on how the drugs were concealed more often than not indicates an intention to avoid detection and thereby point to knowledge. Obviously, drugs traffickers would not carry drugs openly but they would make use of all kinds of ploy or trick or deception to conceal the drugs from being detected by enforcement agencies. In *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764, Gopal Sri Ram JCA (as he then was) said:

> Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detention by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of the individual case.

[20] Reverting to the present case, the proper and only irresistible inference to be drawn from the facts and the circumstances must be that the appellant knew that she was carrying the dangerous drugs concealed in the girdle. Still, she was willing to take the risk. But as it turned out, the dangerous drugs were found hidden in the girdle she was wearing at the time of her arrest at KLIA when she was about to board a flight bound for Jogjakarta, Indonesia.

[21] We turn next to the second ground raised by learned counsel for the appellant. That is, the learned judge misdirected herself when she held that the defence was a bare denial whereas the evidence by the appellant was consistent with her cautioned statement. It was argued that the learned judge had failed to consider sufficiently the cautioned statement of the appellant. The appellant had made prompt disclosure of her defence in her cautioned statement. The defence that the appellant had no knowledge that the girdle she was wearing contained drugs, that she had been forced to wear the girdle by a woman named Deta who sent her a threatening SMS, that she had been given the girdle by a black man whom she met in Bangkok and she had thought the girdle contained money was consistent with her cautioned statement.

[22] In our view, the cautioned statement made by the appellant to the police, is not in itself evidence of the truth of the facts stated therein. The

cautioned statement must not be accepted at face value but has to be tested and evaluated by taking into account the entire evidence placed before the court. This brings into focus the question whether the appellant's cautioned statement was considered by the learned judge and whether in her judgment she addressed her mind to it. As a matter of general principle, it is a serious misdirection by way of non-direction, which would occasion a failure of justice and warrant appellate interference, if indeed the learned judge had failed to judicially consider at all the appellant's cautioned statement. In this regard, what is most important is whether or not in substance and effect the learned judge in her judgment had adequately considered and judicially appreciated the cautioned statement. A careful reading of the judgment reveals that the learned judge narrated the appellant's cautioned statement as can be seen at p 226 of the appeal record ('AR'). Then, as can be seen at pp 234–235 of the AR, she took exceptional care to consider and judicially appreciate the gist of the appellant's evidence in court and tested it with the cautioned statement. In the words of the learned judge:

> The above story also differs substantially from the version given by the accused in her cautioned statement recorded on 23.3.2009, 6 days after her arrest on 17.3.2009. In her statement the accused claims her visits abroad were on the instructions of Deta who had 'tawarkan kepada saya untuk bekerja keluar negara membeli pakaian-pakaian sutera'. There was no mention of purchasing items for her shop in Jogjakarta in her cautioned statement.

[23] Clearly, the learned judge had directed her mind to the appellant's cautioned statement. In the later part of her judgment, she concluded as follows:

> Thus on the totality of evidence adduced, including the evidence in defence, I am of the opinion that the defence has failed to raise reasonable doubt on the prosecution case. The defence has also failed on the balance of probabilities, to rebut the presumption of trafficking.

[24] On the facts of the present case, in our view, the learned judge was entitled and correct in making such a finding. Accordingly, we find no merit in the arguments of learned counsel for the appellant under this head of complaint.

[25] This brings us to the third and final ground. Learned counsel had argued that the learned judge had failed to consider that the onus is upon the prosecution to check whether the appellant's version as true and to disprove the important part of the appellant's version of facts. It was in the cautioned statement that the appellant had SMS Deta when she was in Bangkok. The police seized the handphone and three sim cards but did not investigate the other two sim cards which were not from Malaysia. It was submitted that the

learned trial judge misdirected herself when she failed to hold that the failure by the investigating officer to conduct further investigation to discover the existence of Deta is prejudicial to the appellant.

[26] We do not find any merit in this argument. In the first place, as a matter of general principle, a court is unconstrained to view with suspicion the defence of an accused if the accused failed to provide relevant information for the police to carry out investigation into the probability of the defence. Such a failure may affect the weight that the court attached to the accused's defence. In the case of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, the appellant was charged with the offence of trafficking in dangerous drugs under the Act. The appellant and his college mate ('PW12') were both arrested by the police in an ambush. The appellant, upon hearing shouts of the police, threw away a package that he had collected from a courier service company. In obtaining the package, the appellant had signed the name 'Ling Hang Wei' instead of his own on a copy of the consignment note (exh P4). The package was found to contain 371.12g of cannabis and the appellant was charged accordingly. The High Court convicted and sentenced him to death and his subsequent appeal to the Court of Appeal was dismissed. In his appeal to the Federal Court, one of the grounds advanced by the appellant was that the Court of Appeal erred in law in not directing its mind sufficiently on the serious misdirection by the trial judge, who had imposed on the appellant a duty to disclose relevant information, in particular regarding a person named 'Ho Seng' (who allegedly requested the appellant to collect the package containing the drugs), in his cautioned statement to the police. In dismissing this argument, Zulkefli Makinudin FCJ (as His Lordship then was) in delivering the judgment of the Federal Court said:

> In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and after his arrest, goes some way to support the case for the prosecution.
>
> Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Ho Seng', ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about 'Ho Seng' for the police to carry out investigation into the probability of his defence, entitled the trial judge to disbelieve him.

[27] Coming back to the present case, in her cautioned statement this is what the appellant said concerning Deta:

> S: Siapakah yang menyuruh kamu keluar negara?
>
> J: Seorang perempuan Indonesia yang bernama Deta. Saya mengenali Deta

di Jakarta Barat melalui seorang kawan saya. Deta tawarkan kepada saya untuk bekerja keluar negara membeli pakaian-pakaian sutera. Jadi saya bersetuju dengan tawaran pekerjaan daripada Deta. Deta juga menyatakan pekerjaan tidak membahayakan diri saya.

S: Adakah dua bungkusan dadah adalah milik kamu?

J: Tidak, dadah itu milik lelaki kulit hitam yang saya jumpa di Lee Garden Hotel Bangkok Thailand.

S: Apakah nama lelaki kulit hitam tersebut?

J: Saya tidak tahu.

S: Berapa kali kamu berjumpa dengan lelaki kulit hitam tersebut?

J: Sekali sahaja pada tarikh 15/03/2009.

S: Apakah tujuan kamu berjumpa dengan lelaki kulit hitam tersebut?

J: Dia beri seluar warna coklat muda yang berisi dua bungkusan yang saya tidak tahu apa isinya, kemudian dengan isyarat kepada saya, dia suruh saya pakai bila saya hendak pulang ke Indonesia.

S: Adakah kamu tidak tahu seluar yang di dalamnya berisi bungkusan itu adalah dadah?

J: Saya tidak tahu, saya SMS tanyakan kepada Deta apakah isi bungkusan tersebut, lalu Deta cakap tidak ada apa-apa dan menyuruh saya pakai. Saya SMS kepada Deta dan katakan kalau saya tidak memakai seluar tersebut apa akan terjadi, lalu Deta menjawab kalau saya tidak pakai tanggunglah sendiri akibatnya.

S: Sepanjang kamu berada di Thailand, adakah Deta menghubungi kamu?

J: Sekali sahaja, itu pun ketika saya mahu masuk ke Malaysia. Deta berpesan kepada saya agar saya memakai celana yang diberi oleh lelaki kulit hitam tersebut. Deta lebih banyak berhubung dengan saya melalui SMS.

S: Berapakah upah yang diberikan kepada kamu?

J: Deta tidak cakap berapa upah yang dia mahu beri, tetapi selepas selesai kerja dan saya pulang ke Indonesia barulah dia berikan wang kepada saya.

S: Berapa kali kamu pernah berjumpa dengan Deta?

J: Enam kali, setiap kali saya hendak keluar negara saya akan berjumpa dengan Deta. Deta yang akan menguruskan segalanya untuk saya keluar negara.

S: Apakah pekerjaan Deta?

J: Saya tidak tahu.

[28] In her cautioned statement, the appellant pointed all the blame to Deta. It is her version that she was deceived by Deta to carry the dangerous drugs and that she was arrested for an offence she did not commit. It is therefore only

reasonable to expect that after her arrest she would provide all relevant information regarding Deta to the police. The appellant had this opportunity when gave her cautioned statement to Inspector Zulkifli bin Ariffin ('PW7') on 23 March 2009, about six days after her arrest. The appellant disclosed to PW7 the name Deta but she never gave any further information about Deta. It is incredible that she would forgo the opportunity to disclose to PW7 everything she knew about Deta if what she said about Deta's involvement was true. Surely, police investigation into Deta depended very much on the necessary information provided by the appellant. In her judgment the learned judge has this to say:

> There is also nothing in her defence that refutes this court's finding of mens rea knowledge on her part. The accused claims to have received the girdle from a black man in Bangkok. However, she could give no further details of the black man — his name or contact number. Neither did she attempt to get such details from him or Deta or to inquire if she would be paid for the job. Even if it was true that it was the black man who gave her the girdle, that does not rule out knowledge of the contents of the girdle as possession is distinguishable from ownership. She claims she was threatened by Deta to wear the girdle but could not elaborate on the nature of the threat. She also claims ignorance of Deta's address or contact number. However in her cautioned statement she claims to have sent at least two SMS to Deta.

[29] In the circumstances of this case, the learned judge is entitled and justified to view with suspicion the defence of the appellant given that she had failed to provide relevant information about Deta for the police to carry out investigation into the probability of her defence. We found that the learned judge had not misdirected herself on the law.

[30] Still, there are two points we want to put emphasis on here. First, failure on the part of the appellant to provide all the relevant information about Deta to the police can never, by itself, relieve the prosecution of its duty of establishing the charge against the appellant beyond any reasonable doubt (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209). Secondly, it is the duty of the court to consider the defence of an accused, no matter how weak or unreasonable the defence story may be. It is a serious misdirection by way of non-direction, which would occasion a failure of justice, warranting appellate interference, if trial court failed to judicially consider the defence (see *Nur Azmi bin So'aib v Public Prosecutor* [2012] 2 AMR 112).

[31] To resume our discussion regarding the present case, based on the evidence, in our judgment, the prosecution in this case has already discharged the burden which rests upon it to prove its case beyond reasonable doubt against the appellant. Furthermore, we were satisfied that the learned judge had carefully evaluated and assessed all the evidence placed before her at the trial with regard to the involvement of Deta. In our judgment, the learned judge

directed herself correctly upon this aspect of the law. There is more than sufficient admissible evidence contained in the AR, to support the learned judge's findings and conclusions of fact in rejecting the defence of the appellant and that the defence had failed to raise any reasonable doubt on the case of the prosecution. Therefore, we agree with Puan Samihah, the learned deputy public prosecutor that there is no justification for the appellant now to complain that the failure on the part of the police to investigate thoroughly the existence of Deta had prejudiced her.

[32] For all these reasons we had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned judge upon the appellant.

Appeal dismissed.

Reported by Afiq Mohamad Noor